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No. 07-288

In the Supreme Court of the United States

RONALD W. COTTRELL AND IVY WILLIAMS,

PETITIONERS,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether this Court has jurisdiction to consider whether the NCAA's confidentiality bylaw should affect the "limited purpose public figure" analysis, where the Alabama Supreme Court rejected petitioners' conspiracy claim on independent and adequate state grounds, and the bylaw was not in effect during the time period relevant to petitioners' website-based defamation claim.

(2) Whether petitioners' voluntary agreement to abide by the NCAA's confidentiality bylaw categorically precludes a finding that they are "limited purpose public figures" under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

(3) Whether the state courts' rulings that petitioners had not presented sufficient evidence to survive summary judgment on the existence of a conspiracy, or on whether the NCAA was the source of any media leaks, constitutes a violation of due process because an Alabama statute privileges the news media from disclosing the identity of their sources in litigation.

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INTRODUCTION

This case arises from an unsuccessful defamation suit by petitioners Ronald W. Cottrell and Ivy Williams, who are former assistant football coaches at the University of Alabama (the "University"). As part of their employment at the University, petitioners agreed to abide by the rules and bylaws of respondent National Collegiate Athletic Association ("NCAA"), including NCAA Bylaw 32.1.4, pursuant to which petitioners and the NCAA both agreed not to publicly discuss ongoing NCAA investigations into rules violations. Following an NCAA investigation into the University's recruiting practices in which petitioners admitted to many of the charges against them, petitioners sued the NCAA and others for a variety of claims involving allegedly defamatory statements published during and after the investigation. Petitioners are pursuing just two of their claims in their petition: (1) a claim based on an alleged conspiracy involving the NCAA and Tom Culpepper, a participant in the investigation, to defame petitioners through anonymous leaks to the media (the "conspiracy claim"), and (2) a claim alleging defamation based on an erroneous posting on the NCAA's website (the "website claim"). *See* Pet. 9 n.4.

Petitioners ask this Court to establish a new rule of First Amendment law—which they do not claim any other court has ever embraced—that a defamation plaintiff can never be treated as a "limited purpose public figure" for First Amendment analysis if a "gag order" limits his ability to defend himself in the press. This Court should deny review for several reasons.

First, this issue is not properly presented. This Court lacks jurisdiction over the conspiracy claim

because that claim was dismissed on the adequate and independent state law ground that petitioners did not present sufficient evidence of a conspiracy or of the source of the defamatory statements to survive summary judgment. As for the website claim, the NCAA rule against public comment on a pending investigation was not even in effect at the time the allegedly defamatory website posting was published. At that point the investigation was over. The website claim therefore does not provide a vehicle for this Court to consider whether the NCAA rule should affect the First Amendment analysis.

Second, this case does not present a genuine "gag order" in any event. What petitioners describe as a "gag order" is simply their voluntary agreement with the NCAA not to discuss a pending investigation. Petitioners' speech was "restricted" only insofar as they voluntarily chose to limit their own speech in order to pursue prominent college athletic positions. Even if a genuine governmental (or quasi-governmental) restriction on speaking with the media would be relevant to a court's analysis under *New York Times v. Sullivan*, that question should await a case in which it is actually raised. Petitioners never argued below that their voluntary private agreement to follow the NCAA's disclosure rule is in any way comparable to a genuinely coercive state-imposed restriction on speech, and neither of the state courts passed on that question. And this Court has already rejected the notion that a person's desire for college athletic glory makes his decision to abide by the NCAA's rules anything less than voluntary. *See NCAA v. Tarkanian*, 488 U.S. 179, 197-99 (1988).

Finally, the Alabama Supreme Court's analysis is deeply factbound, entirely consistent with this Court's First Amendment jurisprudence, and does not create any conflict with any other court. The Alabama Supreme Court in fact considered and weighed petitioners' restricted access to the media as one factor in determining their status for First Amendment purposes. It simply declined to hold that any such restriction categorically trumped all other considerations, and concluded that, on the facts of this case, the limited effect of any restriction on media access was far outweighed by petitioners' intentional efforts to thrust themselves into the spotlight in connection with a matter of public concern. Petitioners therefore have already received the benefit of the most generous analysis to which they could plausibly be entitled. The petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

In Alabama, public interest in college football is high. R. 5204.[1] The University has a particularly famous football program, and its coaches occupy high-profile positions. R. 6321. When Cottrell was hired as the University's Recruiting Coordinator and assistant coach in 1997, and Williams was hired as assistant coach in 1994, both became well-known figures. App. 13-14. Cottrell's hiring inspired widespread media

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[1] Citations to R. refer to the record of the trial court pleadings, compiled for and filed with the Alabama Supreme Court. In addition, citations to Tr. refer to the transcript of trial testimony, and citations to App. refer to the Appendix attached to the petition.

attention, and he frequently appeared in television, newspaper, and radio interviews during his time at the University, and even after his termination. App. 13; R. 5204-05, 11518-785. Williams similarly held a high-profile position at the University, and took advantage of his significant access to the media based on his reputation as an excellent recruiter and position coach. App. 14; R. 5300. Both coaches also spoke publicly at booster clubs, alumni gatherings, and other events. App. 13-14. Petitioners lost their jobs along with the rest of the coaching staff in November of 2000, following an unsuccessful 3-8 season. App. 14.

The University, along with virtually all other universities and four-year colleges with major athletics programs in the United States, is a member of respondent NCAA, a non-profit, voluntary membership association designed to foster collegiate athletics. App. 2-3. One of the NCAA's primary functions is to "retain a clear line of demarcation between college athletics and professional sports." App. 3. "Deviations from this goal, produced by a persistent and perhaps inevitable desire to 'win at all costs,' have in the past led, and continue to lead, to a wide range of competitive excesses that prove harmful to students and institutions alike." *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 121 (1984).

NCAA's Rules Enforcement Process

Member institutions agree to abide by NCAA rules and submit to its enforcement process. App. 3. Potential rules violations, including recruiting abuses, are investigated by the NCAA's enforcement staff, which decides whether to bring charges before an independent Committee on Infractions ("COI"). App.

3-4. The COI then holds a hearing and determines whether it should impose penalties. App. 4. During an investigation, the member institution, the NCAA's investigator, and all individuals involved must observe NCAA Bylaw 32.1.4, which provides that "an important element of the cooperative principle [between NCAA enforcement staff and member institutions] requires that all individuals who are subject to NCAA rules protect the integrity of an investigation." App. 6. This confidentiality bylaw is "central to the success of this self-policing system" and protects both those who "disclosed [to the NCAA] information contained in the file or about whom the information relates." *Berst v. Chipman*, 232 Kan. 180, 184-85 (1982). This rule is lifted as soon as the COI presents its findings via a press release and Report on Infractions ("Report"). Petitioners, and all other university employees involved in college athletics, voluntarily accept their employment subject to this published rule. App. 57. A breach of the NCAA's confidentiality policy may, at most, "be a violation of the principles of ethical conduct," exposing the violator to NCAA enforcement proceedings. R. 5579.

The University's Prior Recruiting Violations

The investigation at issue in the petition began in 2000. Prior to this particular investigation, the NCAA had investigated and penalized the University for rules violations on two separate occasions. App. 7. In 1995, the NCAA investigated the University and its football coaches for improperly offering financial assistance to a prospective student athlete. App. 7-8. The NCAA identified several serious rules violations, and sanctioned the University. The Alabama Supreme

Court found that numerous newspaper and internet articles evidenced public anger and substantial public discussion over the severity of the penalties. App. 9. Then, in 1998, the University self-reported improper behavior by one of its basketball coaches. App. 9-10. Because the University on its own initiative fired the coach for his recruiting tactics, the NCAA's decision to extend the University's prior probationary period elicited further public outcry over the severity of the sanctions. App. 10. The Alabama Supreme Court found that, once again, there was a vibrant "public discussion" and "public debate" over the sanctions. App. 10.

Both Cottrell and Williams were employed with the University's football program in the midst of the NCAA's investigations and subsequent enforcement actions against the University, and in the midst of major public attention and public comment on the University's football program. App. 7-10. Both chose to pursue these positions during a period when the University's football program and recruiting activities were the focus of intense public scrutiny.

Prior to the 2000 investigation, Cottrell had personally committed so many secondary rules violations, which were self-reported by the University, that he received a one-month suspension. R. 5206-08, 5500-03; Tr. 2759-60. Gene Marsh, the University's Faculty Athletics Coordinator and law school professor, recommended that the University terminate his employment. R. 5255. The Southeastern Conference commissioner, Roy Kramer, discussed NCAA compliance with Cottrell and emphasized that Cottrell's actions would be subject to a high degree of scrutiny because of his notoriety and high-profile

position at the University. R. 5182, 5255, 6319-22; Tr. 2759-60.

The 2000 Investigation

In 2000, the NCAA again investigated the University's football program for allegedly improper recruitment of a prospective student athlete. App. 10-11. During the investigation, a coach at the University of Tennessee informed NCAA investigator Richard A. Johanningmeier that defendant Tom Culpepper had information regarding the University's role in recruiting of that athlete. App. 11. Specifically, Culpepper believed that Logan Young, an athletic representative of the University, may have improperly encouraged the athlete to sign a football scholarship. *Id.*

The NCAA's enforcement staff conducted telephone and in-person interviews, which were also attended by several representatives of the NCAA and the University. App. 15. During the investigation, the media reported accounts of these interviews, attributing their information to "sources close to the investigation," and speculating on the progress of the investigation. App. 16, 81.[2] Petitioners could not identify any sources of the media "leak," but their third amended complaint alleged "that a newspaper article revealing information contained in [Cottrell's] first

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[2] Although petitioners contend that these articles "contained defamatory falsehoods that made it appear they were guilty of major rules violations," Pet. 3, Cottrell admitted to major and secondary rules violations, and Williams admitted to a secondary rules violation. App. 19-21. Neither has ever identified any statements in these news articles that were actually false.

interview was published which, based on Marsh's own statements, had to come from [Marsh] or someone connected to him." App. 16. In addition, media leaks were common within the University's athletics department, and many coaches had previously complained about Cottrell's behavior. Tr. 2296-97, 2762, 2769-70.

Ultimately, petitioners admitted to committing several of the rules violations with which they were charged. For example, Cottrell admitted to receiving improper loans from a booster and allowing a student-athlete to make long-distance calls from his office. App. 20-21. Williams admitted to exceeding the number of permitted recruiting visits to the Memphis area, and the enforcement staff dropped the remaining charges against him. App. 19. The COI's Report described these infractions, which it attributed to unnamed coaches, and also found that Cottrell had not fully disclosed all relevant information to Johanningmeier during the investigation. App. 21-22. The Report stated that the NCAA did not find that Cottrell had engaged in unethical conduct, and declined to assess penalties against either petitioner. App. 19, 21-22.

As in all cases involving major rules infractions, at the close of the investigation the NCAA posted the complete Report and a one-page penalty summary on its website's major infractions database. App. 22. On February 1, 2002, Cheryl Dewees, an administrative assistant for the NCAA, entered the Report and penalty summary for both the University and for a separate investigation involving the University of Kentucky, whose Report had issued the prior day. App. 23; R. 5709-32, 12295-96. While inputting the

information, Dewees inadvertently recopied a sentence from the University of Kentucky's Report into the University's Report, which stated that there was a "show cause provision for a period of 8 years for the former recruiting coordinator." R. 12295-96; Tr. 2594, 2629-31. However, the penalty summary did not mention the name of either petitioner, and this summary was never disclosed to the press. Tr. 2632-33. Because the investigation had been closed, NCAA Bylaw 32.1.4 was no longer in effect at the time the penalty report was posted.

Promptly after petitioners informed the NCAA of this error, the NCAA published a "Major Infractions Database Correction." R. 5161. While correcting this mistake, Weems accidentally forgot to unclick the box labeled "show cause restriction on employees," but this error was immediately corrected when called to her attention. R. 5161-62. Anyone viewing the University's penalty summary could have accessed the entire Report, which was linked to the penalty summary and contained complete and accurate information about the investigation.

In addition, as soon as the investigation closed, Cottrell promptly reported to members of the media that he had been exonerated by the COI, and expressed his views about the NCAA and the closed investigation. R. 5201-02. Williams also held a press conference stating that he had been completely exonerated. R. 5281-82.

Proceedings Below

In 2002, petitioners sued the NCAA, Culpepper, and others based on allegedly defamatory statements published during and after the investigation. App. 25-

26. Included in the third amended complaint were the conspiracy claim and the website claim. *See* Pet. 9. The conspiracy claim alleged that the NCAA and Culpepper conspired to defame petitioners by leaking anonymous statements to the media. App. 80. The website claim alleged that the NCAA published false statements about petitioners in its penalty summary report. App. 75.

The trial court granted summary judgment to the defendants on the conspiracy claim based on a lack of evidence of a conspiracy to defame Cottrell and a lack of "substantial legally admissible evidence that defendant Culpepper conspired with anyone to defame either plaintiff." App. 101. The trial court also ruled as a matter of law that petitioners were public figures for all claims except certain defamation claims against Culpepper not at issue in the petition. App. 97-98, 126. Based on this classification, the trial court dismissed petitioners' website defamation claims because they did not demonstrate that the website's statements were posted with the "actual malice" required by *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). App. 37, 100. One of Cottrell's defamation claims against Culpepper (not at issue in the petition) ultimately reached the jury, which returned a verdict for Cottrell of $6,000,000 in compensatory damages and $24,000,000 in punitive damages. Tr. 3251. However, the trial court granted Culpepper's motion for a new trial on this claim. App. 37-39.

Petitioners appealed to the Alabama Supreme Court. After conducting the analysis required by *New York Times* and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the court agreed with the trial court that petitioners were limited purpose public figures for both

claims at issue in the petition. The court undertook a three-step process to reach this conclusion. It first isolated the relevant controversy, which it defined as the NCAA's reactions to the University's rules violations and its attempted self-policing. *See* App. 46-49.[3] The court then determined that petitioners voluntarily "injected themselves" and "played a prominent role in the public controversy." App. 51, 57. "Newspaper articles focused on their conduct," and through their behavior and association with Logan, another rules violator, they "assumed ... a prominent position" in the outcome of the controversy. App. 51-52. Finally, the court found that the allegedly defamatory statements for the two claims at issue were "germane to the controversy." App. 61-63.

With respect to NCAA Bylaw 32.1.4, the court recognized that this confidentiality provision prevented petitioners from speaking to the media during the investigation (but not before or after the investigation). The court held that this restriction "deserves weight in making the determination" of petitioners' status, but concluded that "the imposition of a 'gag order' does not *necessitate* a finding" that petitioners were private figures. App. 54 (emphasis added). Ultimately, the court concluded that petitioners' voluntary efforts to insert themselves into a public controversy, and the prominent roles they played, "significantly outweigh[ed] the effect of the gag order." App. 54, 57.

Because petitioners could not demonstrate that the errors posted on the NCAA's website met the "actual malice" standard mandated by *New York Times*, the court affirmed the dismissal of the website defamation

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[3] Petitioners concede that this was a public controversy. App. 271.

claim. App. 77-78. The court concluded that, viewing the evidence in the light most favorable to petitioners, the evidence at most established that the misstatements in the penalty summary report were due to a "clerical error" by DeWees and did not manifest "an extreme departure from the standards of investigation and reporting." App. 77.

The court then affirmed dismissal of the conspiracy claim on unrelated state-law grounds. It held that petitioners had not created any genuine issue of material fact sufficient to reach the jury on the question of whether "the NCAA or Culpepper were the sources of the leaked information or that they conspired to leak information to the media." App. 81-82. The court found that (1) numerous individuals besides the defendants attended the interviews conducted by the NCAA and could have provided information to the press; (2) petitioners conceded that "they had no facts or evidence indicating that anyone at the NCAA leaked information to the press during the investigation" and conceded that Marsh was the source of some of the media's allegedly defamatory information; and (3) petitioners' evidence of conspiracy consisted only of "speculation and conjecture." *Id.* These findings were based on Alabama conspiracy and defamation law and Alabama civil procedure, and were unrelated to petitioners' status as limited purpose public figures.

Petitioners now seek certiorari exclusively on the conspiracy claim alleged against the NCAA and Culpepper, and the website claim alleged against the NCAA.

REASONS FOR DENYING THE WRIT

Petitioners ask this Court to grant review in order to establish a new rule of law: that a defamation plaintiff who voluntarily agrees with the defendant not to discuss a pending investigation can never be a limited purpose public figure for First Amendment purposes—no matter how public the investigation, and no matter how intentionally the plaintiff inserted himself into the public eye. This case does not provide a vehicle for reaching that issue, and in any event petitioners cannot cite any court that has ever embraced their theory. There is no conflict, and the claim is entirely meritless. Review should be denied.

First, this case presents no opportunity to reach the main question presented. This Court lacks jurisdiction to consider petitioners' conspiracy-based defamation claim because the Alabama Supreme Court rejected that claim on the adequate and independent state law grounds that petitioners had provided insufficient evidence to establish a conspiracy or tie the alleged defamation to the defendants. (As explained below, petitioners' effort to evade this jurisdictional bar by recasting the state law holding as a due process violation is both frivolous and thoroughly forfeited.) And the NCAA's confidentiality agreement is not even relevant to the only defamation claim that this Court has jurisdiction to review—concerning the inadvertently erroneous web site posting—because the confidentiality rule was lifted before the disputed posting was even made. At the time of the website posting, petitioners took full advantage of their unrestricted access to the media.

Second, even if this Court wished to consider whether a true "gag order" deserves constitutional

significance in determining the status of a defamation plaintiff, that issue is not genuinely presented. The so-called "gag order" about which petitioners complain was nothing more than their own private agreement with a voluntary membership organization, the NCAA, that they would not speak about a pending investigation. Petitioners did not argue below that the private agreement at issue was coerced or otherwise comparable to a state-imposed restriction, and this Court has already squarely rejected the notion that the NCAA's important role in college athletics renders a coach's agreement to follow its rules anything less than voluntary. *NCAA v. Tarkanian*, 488 U.S. 179, 197-99 (1988). Petitioners were not, therefore, prevented from speaking in any way that should matter for First Amendment purposes. The *New York Times* framework is designed to foster the public's interest in robust discourse about matters of public concern, and a defamation plaintiff's choice to limit his own speech should not affect the *New York Times* calculus.

Finally, the Alabama Supreme Court actually considered NCAA Bylaw 32.1.4 in the *New York Times/Gertz* calculus by giving it weight in determining whether petitioners were limited purpose public figures. The court in fact agreed with petitioners that the confidentiality agreement was relevant, but simply declined to impose a blanket rule that every time a plaintiff's access to the media is limited in some way he *per se* cannot be a limited purpose public figure. Petitioners do not cite a single court that has embraced such a sweeping rule. Petitioners simply disagree with the Alabama Supreme Court's conclusion that, on the facts of *this* case, petitioners' intentional efforts to thrust themselves into the spotlight in connection with

a matter of public concern outweighed the limited effects of the NCAA's rule. The Alabama Supreme Court's ruling is entirely consistent with this Court's precedents, and petitioners do not identify any conflict among any courts requiring resolution.

I. THE NCAA'S CONFIDENTIALITY BYLAW IS IRRELEVANT TO THE DISPOSITION OF BOTH DEFAMATION CLAIMS

This Court requires a higher standard of proof when a defamation plaintiff is a public official or a public figure, based on the First Amendment "principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times*, 376 U.S. at 270. When a public figure or a public official sues for defamation, the First Amendment requires that he prove that the defamatory statement was made with "actual malice." *Id.* at 280; *see also Gertz*, 418 U.S. at 336-37. This higher standard is necessary to protect First Amendment interests because even an "erroneous statement is inevitable in free debate, and ... must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive.'" *New York Times*, 376 U.S. at 271-72 (citation omitted) (alteration in original). A liability rule that penalizes even false speech in connection with public discourse "dampens the vigor and limits the variety of public debate." *Id.* at 279. This Court has held that the "actual malice" requirement for defamation cases "reflects our considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment."

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988).

In *Gertz*, this Court held that the actual malice standard applies to "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classified as public figures." 418 U.S. at 342. This Court explained that whether a plaintiff is deemed a public figure turns primarily on whether he has been drawn into the public eye. Although some persons are so famous as to be deemed "public figures" in all instances, "[m]ore commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." *Id.* at 351.

This Court expressly considered the role of a public figure's access to the media in rebutting any allegedly defamatory statements. It held that, although access to the media is a relevant consideration, "[m]ore important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs." *Id.* at 344. A public figure, by virtue of his role in society, "runs the risk of closer public scrutiny than might otherwise be the case." *Id.* This Court recognized that access to the media was unlikely to have any meaningful effect in any event: "Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie." *Id.* at 344 n.9. In other words,

this Court held that access to the media is relevant to the First Amendment analysis but far from the dominant consideration. Instead, this Court explained that the plaintiff's role in a public controversy is "more important." *Id.* Plaintiffs who intentionally insert themselves into the public eye, or have control over the outcome of a public controversy, assume an even greater risk of public scrutiny, and are more likely to be classified as public figures. *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1297 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980).[4]

The Alabama Supreme Court followed this Court's framework in *Gertz* and considered the effect of the NCAA's confidentiality provision as one relevant factor. The Alabama Supreme Court gave that factor weight, but ultimately concluded that it was outweighed by petitioners' voluntary efforts to insert themselves into the spotlight in connection with a topic of public concern. App. 54. The court held that petitioners, by virtue of their improper conduct and their association with Logan, played a prominent role in a public controversy and had a significant effect on its outcome. App. 51, 58-59. In addition, petitioners assumed the risk of public scrutiny and voluntarily "injected themselves" into a public controversy by accepting and holding important positions on a highly-publicized athletic staff, despite knowing that the University's behavior had been the subject of

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[4] To be clear, petitioners do not challenge the propriety of this framework, and they do not —either in their questions presented or in the body of their petition—ask this Court to revisit or overrule it.

controversial investigations and was in the public spotlight. App. 57. These factors all outweighed the effect of NCAA Bylaw 32.1.4, which the court duly considered when determining petitioners' status. App. 54. The Alabama Supreme Court ultimately concluded that petitioners were "limited purpose public figures," meaning that they were considered public figures only with respect to statements germane to a particular public controversy into which they were injected. *See* App. 42; *see also Gertz*, 418 U.S. at 351.

Petitioners now ask this Court to decide whether the Alabama Supreme Court violated this "First Amendment framework for defamation cases by holding, *despite Cottrell's and Williams' strict compliance with the NCAA gag order*, that they were 'limited purpose public figures.'" Pet. i (emphasis added). Petitioners apparently contend that the presence of a "gag order" precluding unfettered access to the media should render any factual weighing unnecessary and establish that a defamation plaintiff is a private figure as a matter of law. But even if that argument had any merit at all (it does not), this case would not provide a suitable vehicle to review the issue, for two independent reasons.

First, the relevance of any "gag order" to the First Amendment analysis is not actually presented by any claim that this Court has jurisdiction to review. This Court lacks jurisdiction to address the dismissal of the conspiracy claim, which rested on adequate and independent state law grounds that would remain unaffected by any ruling this Court could make. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a

state law ground that is independent of the federal question and adequate to support the judgment."). When the same judgment would be rendered notwithstanding this Court's correction of federal law, its review could amount to nothing more than an impermissible "advisory opinion." *See Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

The Alabama Supreme Court based its dismissal of the conspiracy claim on both a lack of evidence that the NCAA and Culpepper were the sources of the leak to the press, and on a lack of evidence of conspiracy. *See* App. 81-82. The court found that numerous individuals besides defendants could have leaked information to the media, and that petitioners' evidence of a conspiracy consisted of "speculation and conjecture." App. 81. These conclusions of Alabama law concern only Alabama's evidentiary requirements for demonstrating the state law portions of a defamation claim and for establishing a conspiracy. A plaintiff alleging a conspiracy under Alabama law must show "'not only that there was such a conspiracy but that *the particular defendant* charged agreed with one or more of the other conspirators on the claimed illegal object of the conspiracy,'" *First Bank of Childersburg v. Florey*, 676 So. 2d 324, 328 (Ala. Civ. App. 1996) (citation omitted) (emphasis added), and a plaintiff claiming defamation must "specify any defamatory statements" by the defendant. *Butler v. Town of Argo*, 871 So. 2d 1, 22 (Ala. 2003). Petitioners did not satisfy the Alabama Supreme Court, based on its application of Alabama summary judgment standards, that they had sufficient

evidence to reach a jury on either of these state-law requirements.[5]

In dismissing this claim, the court did not rely on petitioners' status as limited purpose public figures under *Gertz*, and did not even consider whether the statements leaked to the press involved "actual malice." App. 80-82. The court was clear that it made its decision on the basis of state law. *See* App. 81-82 ("Viewing the evidence in the light most favorable to Cottrell and Williams, we conclude that substantial evidence was not presented that the NCAA or Culpepper were the sources of the leaked information or that they conspired to leak information to the media ...."). A holding that the confidentiality agreement rendered petitioners private actors would therefore have no effect on the judgment of the Alabama Supreme Court, and review of this claim is jurisdictionally barred. *See Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387 (1986) ("[W]e have no authority to review state determinations of purely state law. Nor do we review federal issues that can have no effect on the state court's judgment."). Further, to the extent that the dismissal of this claim hinges upon disputed issues of fact, this Court affords deference to the Alabama Supreme Court's fact-finding. *See Hernandez v. New York*, 500 U.S. 352, 366 (1991) (holding that, in the absence of exceptional circumstances, the Court defers to state-court factual findings, even when those findings relate to a

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[5] The Alabama Supreme Court's holding echoed the trial court's judgment that the evidence of conspiracy was insufficient to survive summary judgment. App. 33-34.

constitutional issue).[6] Any dispute over factfinding central to the resolution of the conspiracy claim also makes this case an exceedingly poor vehicle.

Petitioners' website-defamation claim—the only claim over which this Court would have jurisdiction—is equally unaffected by the existence of NCAA Bylaw 32.1.4. As petitioners concede, the confidentiality agreement was lifted by the time the NCAA posted the penalty summary on its website. Pet. 23. At the close of the investigation, petitioners had unlimited access to the media, and they in fact took advantage of this media access by giving interviews and holding press conferences to explain that the NCAA had assessed no penalties against them. As a result, the confidentiality agreement is irrelevant to disposition of the website claim and affords the Court no opportunity to determine the effect of a "gag order" on the status of a defamation plaintiff.

In an attempt to avoid the fact that there was no supposed "gag order" in place, petitioners contend that "although the gag order was lifted, its damaging effect endured" because "while the coaches were finally able ... to proclaim publicly that they had been cleared of allegations of major rules violations ... their reputations had already been permanently injured by the combination of the defendants' defamatory media leaks and the coaches' inability to respond to them." Pet. 23. This argument is a transparent attempt to

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[6] In order to avoid the jurisdictional bar, petitioners resort to repackaging the lower court's state-law evidentiary ruling as an alleged due process violation. As explained *infra* in Section III, this claim is both forfeited and completely meritless. Petitioners cannot escape the fact that the dismissal of their conspiracy claims raises no dispositive First Amendment issues for this Court.

conflate the two claims at issue to escape the problem that neither alone raises the issue on which review is sought. Any continuing injury to petitioners' reputation after the confidentiality agreement terminated does not speak to the effect of NCAA Bylaw 32.1.4 on petitioners' *website* claim, but only to the damages endured from petitioners' *conspiracy* claim, which is jurisdictionally barred from review. The alleged website defamation began and ended during a period when petitioners possessed, and benefited from, unrestricted access to the media.

Moreover, petitioners concede that access to the media would not have mitigated any damages from the inaccurate penalty report. According to petitioners, "Cottrell and Williams did not actually engage in self-help to protect their reputations from the continuing defamatory falsehoods ... because, for a period of two years they were *personally unaware of the defamation*." Pet. 24 (emphasis added).[7] As soon as petitioners noticed the website's error, however, they informed the NCAA, which promptly undertook measures to rectify the posting. According to petitioners, "the factor of media access for self-help [was] much less meaningful" to this claim. *Id.* This admission, which virtually concedes that the website claim is irrelevant to the questions presented, also creates an internal inconsistency in petitioners' argument, because they simultaneously argue that the confidentiality agreement should have been dispositive of their status *and* assert that media access was not a

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[7] Indeed, petitioners have never alleged or identified any adverse effects or any actual injury flowing from this scrivener's error.

meaningful factor in this claim. Petitioners cannot have it both ways.[8]

Second, even if the issue were somehow reviewable, NCAA Bylaw 32.1.4 is not a "gag order" in any sense that could be meaningful under the First Amendment. Petitioners concede (correctly) that the NCAA was not a state actor during its investigation. Pet. 22 n.13; *see also Tarkanian*, 488 U.S. at 199. The NCAA unquestionably "enjoyed no governmental powers to facilitate its investigation. It had no power to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individual." 488 U.S. at 197. NCAA Bylaw 32.1.4 was simply a voluntary membership organization's internal bylaw that member institutions and employees choose to abide by in order to "protect the integrity of its investigations." *See* App. 6. The NCAA rule therefore does not create any real cognizable restriction on petitioners' ability to access the press. Petitioners were restricted only insofar as they chose to limit their own speech in order to remain part of the NCAA's athletic program. A plaintiff's voluntary decision not to speak to the press obviously is not analogous to a "gag order." And the fact that the plaintiffs chose not to speak *in exchange for some benefit that they considered more valuable than speaking* cannot change that analysis—unless, perhaps, the choice at issue was so coercive that the law is prepared to regard it as no

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[8] The fact that media access could not have cured any injury from the website claim also undermines the argument that, by the time of the penalty summary report, Cottrell and Williams "had faded into the relative obscurity of completely private lives." Pet. 23. This contention, even if true, is unrelated to the impact of the confidentiality policy on the public-figure analysis.

choice at all. Petitioners have never argued, below or even in this Court, that their decision to abide by NCAA bylaws was meaningfully coerced, and have therefore forfeited any right to do so. Regardless any such claim would be meritless. This Court has already squarely held that membership in the NCAA is a voluntary decision, despite the consequences of non-membership for anyone aspiring to participate in mainstream college athletics. *See Tarkanian*, 488 U.S. at 198-99 & n.19.

Even if this Court were inclined to review petitioners' argument that a true "gag order" restricting a plaintiff's access to the press should trump all other considerations in the First Amendment analysis, this Court should await a case in which that issue is actually presented. What petitioners are calling a "gag order" is nothing more than the bargain they struck in order to coach Alabama football, which is not remotely a First Amendment concern.

II. THE ALABAMA SUPREME COURT'S RULING WAS BASED ON A SETTLED AND CORRECT LEGAL STANDARD

For all of petitioners' rhetoric about the relevance of the NCAA's supposed "gag order," they virtually ignore the fact that the Alabama Supreme Court *did* consider and weigh that supposed restriction on access to the media as one factor in determining petitioners' status as limited purpose public figures. Petitioners therefore must either be challenging the Alabama Supreme Court's factbound weighing of the various *Gertz* factors on the record of this particular case (which obviously is not worthy of review by this Court), or arguing for a broad and radical new rule of

law that any restriction on media access *automatically and categorically* prohibits a court from concluding that the plaintiff is a limited purpose public figure.

The general tenor of the petition suggests that the latter is their argument. But petitioners do not, and cannot, point to a single decision by any court embracing their view regarding the effect of a confidentiality agreement (or even a true gag order) on the status of a defamation plaintiff. The Alabama Supreme Court followed established law, and its decision is consistent with this Court's decisions and with the only two cases (both from district courts) that have ever addressed this issue, or anything like it, directly. The Alabama Supreme Court weighed the media restrictions as one factor in determining whether petitioners were limited purpose public figures. This balancing is consistent with established law (ignoring for the moment the fact that the supposed "gag order" here was actually anything but) and is the most that petitioners could possibly be entitled to.[9]

Petitioners identify just two district court decisions in which a similar issue has arisen. *See* Pet. 13 n.7. (citing *Sculimbrene v. Reno*, 158 F. Supp. 2d 8 (D.D.C. 2001); *Price v. Chaffinch*, Nos. 04-956 (GMS), 04-1207

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[9] Although petitioners argue that the Alabama Supreme Court applied an "unconstitutional" standard in classifying them as limited purpose public figures, *see* Pet. 16, it is worth noting that the First Amendment protections were invoked (as they always are in defamation cases) by the *defendants*, not by the petitioners. Even if the Alabama Supreme Court erred in classifying petitioners as limited purpose public figures (which it did not), it certainly did not violate the Constitution by applying a rule that provides *greater* protection for speech.

(GMS), 2006 WL 1313178 (D. Del. May 12, 2006)).[10] Both involved speech restrictions that were actually imposed by the government rather than by voluntary private agreement. And in both of those cases, the courts, just like the Alabama Supreme Court here, balanced the effects of a media restriction against the plaintiff's role in a public controversy, and nevertheless deemed the plaintiff a limited purpose public figure. In *Sculimbrene*, an FBI agent who had given testimony about the White House's "Filegate" scandal sued a media commentator, the FBI's General Counsel, and other White House officials for conspiring to harm his reputation. 158 F. Supp. 2d at 15-16. The district court held that although the plaintiff's ability to access the media was "circumscribed by his employment by the FBI," he played a significant role in determining the outcome of the controversy, such that stifling debate on this issue by classifying plaintiff as a private figure "would likely thwart the intent which underlies the heightened First Amendment protections articulated

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[10] The fact that petitioners cite only two defamation decisions involving "gag orders" also highlights the rarity of these types of cases. Although petitioners contend that this "is an issue which is highly likely to arise again," they provide absolutely no support for this view. *See* Pet. 7 n.2. Petitioners further narrow the applicability of any rule established in this case by (1) arguing that gag orders are of special significance when imposed by the *defendant*, and (2) asking the Court to apply its proposed rule only in cases where a defamation plaintiff "is neither a public official nor a general purpose public figure." *See* Pet. 8-9. Plaintiffs strive to narrow the scope of their rule in order to make it applicable to this case, but in doing so they virtually ensure that it will have no broader application.

in *New York Times v. Sullivan* and its progeny." *Id.* at 23-24.[11]

Relying on *Sculimbrene*, the district court in *Price* held that a state trooper allegedly defamed by his supervisor was a limited purpose public figure, despite the fact that the plaintiff's "access to the media was limited to the point of being non-existent by [the supervisor's] imposition of a gag order." 2006 WL 1313178, at *6. The court held that this gag order, imposed by the government against a public employee, "cuts against [plaintiff's] public figure status," but not enough to outweigh the fact that (1) the public controversy in which plaintiff was embroiled existed before the gag order, and (2) by accepting his job at a controversial facility, plaintiff knew or should have known that he might be the subject of public scrutiny and defamation. *Id.*

The Alabama Supreme Court similarly held that the NCAA confidentiality bylaw (which was much less onerous than the true gag orders in the aforementioned cases) "deserves weight" in determining whether an individual is a limited purpose public figure, "but it does not prevent such a finding." App. 54. As in *Gertz*, the Alabama Supreme Court deemed it more important that petitioners played "a prominent role in the public controversy" and that "they had assumed by their actions and their association with Logan [the major target of the NCAA's investigation] a prominent position in its outcome." App. 51. In addition,

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[11] Notably, the court determined that the existence of the gag order created "a somewhat atypical" case, 158 F. Supp. 2d at 23, which further undercuts the need for this Court's review.

petitioners' limited access to the media was outweighed by the fact that they "invited public scrutiny" and "proactively engaged in the conduct that was the subject of alleged rule violations and admitted certain violations." App. 59.

This holding is sensible for several reasons. First, this Court has long recognized that access to the media is only one reason for the public/private distinction, and should not be an outcome-determinative factor. *See Gertz*, 418 U.S. at 344-45. Indeed, in *Gertz*, this Court expressly recognized that *other* factors were even more meaningful, such as the fact that "those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved ... [and] invite [public] attention and comment." *Id.* at 345. In addition, the Alabama Supreme Court's factual conclusions about the limited effect of the NCAA's rule were eminently correct. Cottrell and Williams were frequently interviewed by the media before the NCAA's investigation, and their appearance in the media continued following their termination. App. 13-14; R. 5201-02, 5281-82. Their attorneys also appeared on sports talk shows and were interviewed by newspapers, and they publicly proclaimed their innocence at press conferences and in interviews at the close of the investigation. R. 5828-29, 5281-82. Although Cottrell and Williams voluntarily agreed to abide by the NCAA's limited confidentiality provision, it did not significantly impede their ability to engage in self-help through the media.

Further, the rule proposed by petitioners would lead to undesirable results. The NCAA unquestionably has a strong interest in rooting out improper recruiting

practices that threaten to undermine the entire enterprise of amateur college athletics. *See Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 127 S. Ct. 2489, 2495 (2007) (holding that an athletic association's important interest in enforcing its rules and preventing recruiting violations can "sometimes warrant curtailing the speech of its voluntary participants"). Allowing the NCAA to surround investigations with the protection of confidentiality (by all parties, including the NCAA) is necessary to safeguard sensitive information critical to rooting out recruiting abuses, as well as to protect procedural fairness in the investigation and ensure that unproven accusations are publicized as little as possible before ultimate conclusions are reached. *See Berst v. Chipman*, 232 Kan. 180, 192 (1982) (recognizing the "highly valued interest[] ... in confidentiality, both to prevent embarrassment to persons who have relied on pledges of secrecy in disclosing information to the NCAA or about whom information in the file may relate, and to promote the public interest in the supervision of intercollegiate athletics to prevent corruption in that area"). Such policies will often protect the subject of an investigation as much as they limit him. Petitioners' proposed rule would effectively force the NCAA (and other organizations like it) to choose between the benefits of such interim-confidentiality policies and the protections of the *New York Times/Gertz* rule. It would increase the risk of frivolous defamation suits, and reduce incentives to cooperate with investigations.

Petitioners attempt to manufacture some tension in the law by citing to *Warford v. Lexington Herald-Leader Co.*, 789 S.W.2d 758 (Ky. 1990), *cert. denied*, 498

U.S. 1047 (1991), a case that held that a college basketball coach was a private figure. *See* Pet. 16. *Warford* is clearly distinguishable from this case, however, because the *Warford* court found that the plaintiff was not involved in a "particular and identifiable public controversy," and "never publicly spoke out on recruiting issues." 789 S.W.2d at 769. Here, the Alabama Supreme Court concluded that an identifiable public controversy existed into which petitioners voluntarily inserted themselves, App. 55-57, and that petitioners were well-known individuals who often spoke about their jobs in the press. App. 13-15. The Alabama Supreme Court's decision therefore accords with this and other courts' longstanding precedent.

Petitioners' argument that the Alabama Supreme Court applied an "unconstitutional *Rosenbloom*-type analysis," *see* Pet. 14, simply reflects their disagreement with the Alabama Supreme Court's factual conclusions. The decision below in no way resembles the later-overruled *Rosenbloom*, which imposed the "actual malice" standard on defamation suits by private actors so long as they were involved in "an event of public or general concern." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 47-48, 52 (1971). The Alabama Supreme Court properly applied *Gertz* and focused on *petitioners' role* in the controversy and their own decisions, not simply the nature of the controversy, in classifying them as public figures.

III. PETITIONERS' DUE PROCESS CHALLENGE TO THE ALABAMA SUPREME COURT'S SUMMARY JUDGMENT RULING IS FORFEITED AND MERITLESS

In an obvious attempt to evade the jurisdictional bar created by the Alabama Supreme Court's fact-based, state law ruling on the conspiracy claim, petitioners attempt to manufacture a due process defect in that ruling. For the first time before any court, petitioners now raise a due process challenge based on their own utter failure to prove any conspiracy or the NCAA's involvement in any media leaks. *See* Pet. 29-30. Petitioners contend that their inability to produce sufficient evidence on the conspiracy claim was the result of an Alabama statute providing the media with a privilege against disclosing sources in litigation—and that that statute somehow violated petitioners' "fundamental right to prove their claims with circumstantial evidence." *Id.* This argument is unavailing for several reasons.

First, petitioners have been aware of Alabama's media privilege law since this case began, and have never before now suggested there was any constitutional problem with their burden of proof. Alabama's media privilege law, (which survived constitutional challenge as early as 1953, *see Ex parte Sparrow*, 14 F.R.D. 351, 353 (N.D. Ala. 1953)), had just as much effect on petitioners' ability to present their case to the trial court four years ago as it does now, yet they have never even alluded to any due process problem in their briefs or argument to any of the courts below. Neither of the courts below passed on the issue, and both courts based their dismissals on the lack of

evidence of a conspiracy. Petitioners also did not establish below that they were ever thwarted by the Alabama media privilege law in attempting to obtain the identities of anonymous sources. Petitioners have therefore forfeited their ability to present this claim. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (holding that argument not raised below was waived).[12]

In addition, petitioners are simply wrong to suggest that the Alabama Supreme Court required petitioners to provide *direct* evidence that defendants were the source of the media leak. The court held only that petitioners did not provide the "substantial evidence" necessary to satisfy their evidentiary burden in light of the fact that the leak could have come from several sources, and in light of petitioners' admission that one of the leaks came from Gene Marsh, an employee at the University. *See* App. 81-82. The Alabama Supreme Court did not say that petitioners could not have carried their burden with circumstantial evidence; the defect was that the limited amount of circumstantial evidence they adduced consisted solely of "speculation and conjecture." *Id.*

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[12] In any event, Ala. Code § 12-21-142, which prevents using discovery to coerce the media into disclosing its sources, did not preclude petitioners from obtaining a wide range of evidence regarding the source of any leaks. Petitioners, for example, were not barred from pursuing discovery from the alleged sources of any leaks, including defendants, who were obligated to testify truthfully. Petitioners also deposed their own media witnesses, Paul Finebaum and John Longshore, who admitted to receiving information from a variety of sources, but never mentioned speaking to anyone at the NCAA. *See* R. 7794-98, 7803-18; Tr. 1710-12.

Finally, even if petitioners did not misstate the Alabama Supreme Court's holding, their constitutional argument would be entirely without merit. There is nothing unusual about scrutinizing the inferences a plaintiff seeks to draw from ambiguous circumstantial evidence before allowing a conspiracy claim to proceed past summary judgment. *See Luck v. Primus Auto. Fin. Servs., Inc.*, 763 So. 2d 243, 248 (Ala. 2000) (dismissing conspiracy claim because plaintiffs provided only generalized evidence of an agreement). Indeed, in the antitrust context, this Court has demanded far more robust proof of conspiracy than the Alabama Supreme Court required here: evidence sufficient to "exclude the possibility that [the alleged conspirators] were acting independently." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). Obviously this Court does not believe that a rigorous standard of proof for conspiracy allegations violates due process.

Petitioners have no constitutional due process right to offer particular types of evidence in a state court civil action against a private defendant in which there is no conceivable argument that the state is depriving petitioners of "life, liberty, or property." The two cases that petitioners cite that invoke the due process clause, *Addington v. Texas*, 441 U.S. 418 (1979), and *Patterson v. New York*, 432 U.S. 197 (1977), required *the state* to meet a high evidentiary burden before depriving an individual of the "fundamental right" to liberty. *See Addington*, 441 U.S. at 425-26 (holding that due process requires states to prove future dangerousness by clear and convincing evidence in a civil commitment proceeding); *Patterson*, 432 U.S. at 209 (holding that requiring a defendant to prove mitigating circumstances did not impermissibly shift the state's

high burden of establishing guilt beyond a reasonable doubt). Both of these cases address a state's obligations with respect to the individual, and neither implies that limiting the sources of a *private plaintiff's* evidence in a civil case implicates any due process concerns whatsoever.

The other cases cited by petitioners are wholly inapposite. Although petitioners argue that the right to prove one's claim through speculative circumstantial evidence is fundamental to the concept of ordered liberty, Pet. 29, their supporting cases establish only that certain federal causes of action permit circumstantial evidence to demonstrate liability. *See USPS Bd. of Governors v. Aikens*, 460 U.S. 711, 713-14 & n.3 (1983) (holding that plaintiff may prove his claim of discrimination under Title VII using either direct or circumstantial evidence); *Rea v. Missouri*, 84 U.S. 532, 543 (1873) (deeming jury instructions misleading because under federal common law "[t]o establish fraud, it is not necessary to prove it by direct and positive evidence"). Whether Alabama's common law defamation cause of action permits such evidence is, of course, a matter of Alabama law. If the Alabama Supreme Court *had* adopted a rule requiring direct evidence to recover in tort under a conspiracy theory (and, again, it plainly did not), that would be its prerogative.

Petitioners' due process arguments are therefore both forfeited and wholly frivolous, and cannot revive their otherwise unreviewable challenge to the Alabama Supreme Court's dismissal of the conspiracy claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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